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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

JAMES MONDRAGON et al., Plaintiffs and Appellants, v. MERITAGE HOMES OF CALIFORNIA, INC., Defendant and Respondent.	C061606 (Super. Ct. No. SCV22126)

Plaintiffs James Mondragon and Janna Mondragon allege defendant Meritage Homes of California, Inc., induced them to purchase a home adjacent to a noisy lumber sawmill by failing to disclose that the mill had a (recorded) easement to conduct mill operations and by misrepresenting the extent of the mill operations. Plaintiffs appeal from a judgment of dismissal following the trial court's sustaining of defendant's demurrer to plaintiffs' action for breach of contract, misrepresentation and fraud.[1] We shall affirm the judgment.[2]

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[1] The trial court also sustained a demurrer by First American Title Insurance Company (presumably served as a Doe defendant),

BACKGROUND

Plaintiffs admittedly knew about the adjacent lumber mill before they purchased their home but complain (1) defendant misrepresented how much of a disturbance it was, and (2) plaintiffs did not know the mill had an *easement* to emit noise, dust and odors onto the adjacent housing (which was built after the mill began operations). The implication of the latter argument is that, without the easement, plaintiffs could have purchased their home and then filed a lawsuit against the mill to abate the nuisance.

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but the judgment on appeal dismissed the complaint only as to Meritage Homes, and plaintiffs state they make no appellate challenge regarding the title company. Generally, an appeal cannot be taken from a judgment that fails to dispose of all claims. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 436-437.) However, an appeal may be taken when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party. (*Ibid*.) The judgment is appealable because it leaves no issue to be determined as to Meritage Homes.

2 Defendant asks this court to take judicial notice of (1) the recorded mill easement, (2) a recorded subdivision map for plaintiff's home, (3) a recorded declaration of covenants, conditions and restrictions (CC&Rs) for plaintiff's home, (4) a trial court ruling in a lawsuit filed by a different person involving similar issues, and (5) pendency of an action by that other person against the lumber mill alleging the mill is exceeding the scope of its easement. We deny judicial notice of items 4 and 5 on the ground they are irrelevant and unnecessary. Plaintiffs' opposition to the request for judicial notice agreed we may take judicial notice of the map and CC&Rs but argued we should not take judicial notice that they provided notice of the mill's easement because they are subject to conflicting inferences. We take judicial notice of items 1, 2, and 3 (the recorded easement, the map and the CC&Rs) and discuss their significance *post*.

The operative pleading is plaintiffs' first amended complaint, filed with leave of court after the sustaining of defendant's demurrer to the original complaint.

The first amended complaint alleged as follows:

In April 2006, plaintiffs purchased from defendant a single family home in the Foskett Ranch subdivision in Lincoln. The home is adjacent to a lumber mill which operates 24 hours a day, 365 days a year, with the highest noise levels generated between 10:00 p.m. and 5:00 a.m. The mill, owned by nonparty Sierra Pacific Industries (SPI), operates under a city use permit first issued in 1996 to conduct large-log loading and cutting operations. Foskett Ranch was developed in 1999 by defendant's predecessor-in-interest, Lincoln Ranch, pursuant to conditions of approval requiring construction of a perimeter sound wall, acoustical analysis, and mitigation measures if noise levels exceeded levels permitted by the city. In 2003, the city required Lincoln Ranch to grant an easement allowing the mill to project noise, dust and odor onto Foskett Ranch, within levels allowed by applicable laws and regulations.

Plaintiffs' complaint admitted, "Defendant disclosed . . . that the lumber mill existed on the adjacent property and that it may constitute an annoyance."

Before entering the purchase agreement, plaintiffs visited the subdivision three times in March 2006. On one of these visits, plaintiffs "specifically inquired [of real estate sales manager Ed O'Neal] as to whether the noise from the mill caused any disturbance. [] O'Neal stated that what [plaintiffs] could

see and hear is how it was '24/7.' [Plaintiffs] then inquired whether [defendant] had received any complaints about the operation of the mill. O'Neal stated that he had not received any complaints regarding the mill." Plaintiffs relied on these representations.

As expressly set forth in the complaint, plaintiffs' purchase agreement included a "DISCLOSURE STATEMENT" from defendant which stated in part under the heading of community-specific disclosure items: "5. LUMBER MILL INFORMATION: The eastern boundary of Foskett Ranch is adjacent to the Sierra Pacific lumber mill. Accordingly, the community may be subjected to some of the annoyances or inconveniences associated with proximity to lumber mill operations such as noise, heavy vehicular traffic, vibration, or odors."

The disclosure statement also stated, "10. EASEMENTS, FACILITIES, UTILITIES: Recorded easements for utilities, storm drainage, water and sanitary sewers, right of way, landscape and other purposes are shown on the title report and the recorded subdivision map." The pleading complained these disclosures failed to disclose the existence of the mill's easement.

After escrow closed, plaintiffs received from Alliance Title a preliminary report, which did not reveal the existence of the mill easement.

Plaintiffs allege the easement was not properly recorded, and plaintiffs therefore had no actual or constructive notice of the easement.

After moving into the home, plaintiffs recognized the mill's noise, dust and odors were substantially more intrusive than had been represented. Defendant refused to buy back the property.

Plaintiffs alleged as follows: Defendant's disclosures were insufficient to advise them of the true condition of the property. Defendant failed to disclose that SPI operated a large-log sawmill on the adjacent property and that the mill operated 24 hours a day, that the noise would prevent plaintiffs from sleeping, that the mill possessed an easement to project noise, dust and odors over plaintiffs' home, that the easement was a cloud on the the title that would severely decrease the property's value, and that the noise, dust and odors would render the home unlivable and unmarketable. The complaint alleged, "Defendant disclosed only that the lumber mill existed on the adjacent property and that it may constitute an annoyance."

Defendant's representation that the noise level was the same "24/7" as it was during plaintiffs' visits was a material misrepresentation of fact. The noise does not remain the same throughout the day and is not seasonally consistent.

Plaintiffs alleged they "neither knew, nor had reason or opportunity to know, of the existence of the easement and of its impact on their legal rights at the time of purchase . . . ." They alleged that, had defendant provided the legally required disclosures, plaintiffs would not have purchased the home.

The complaint alleged five counts against defendant:

(1) Breach of contract, by failing to provide plaintiffs with all material facts;

(2) Negligent misrepresentation, in failing to disclose all material facts;

(3) Intentional misrepresentation, in failing to disclose all material facts;

(4) Intentional misrepresentation "(Concealment of Facts)," because by affirmatively stating that the mill produced the same noise level "24/7," defendant was required to provide a full and complete disclosure regarding the mill noise; and

(5) Fraud in failing to disclose material facts in violation of sections 1102 and 2079.

(6) Breach of contract regarding a title insurance policy by defendant's alleged agent, First American Title Insurance Company, which plaintiffs received in June 2006. The complaint did not identify any breach but merely said a preliminary report (prepared by nonparty Alliance Title) failed to disclose the sawmill's recorded easement.

(7) Negligence in that nonparty Alliance Title breached its duty of care by omitting the recorded easement from the preliminary title report.[3]

Defendant demurred to the first amended complaint, arguing (1) plaintiffs' complaint admitted the mill had an easement; (2) plaintiffs' complaint admitted plaintiffs were aware of the

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[3] Plaintiffs' appellate brief concedes the causes of action against the title company are not part of this appeal.

mill; (3) at a minimum, plaintiffs had constructive notice of the recorded easement, which was a matter of public record, and (4) the allegation that O'Neal said the noise level did not get any louder than it was during plaintiffs' visit was not actionable because it did not allege whether the statement contradicted the terms of the easement.

With its demurrer, defendant submitted a request for judicial notice of the "GRANT OF EASEMENT" recorded in Placer County on December 12, 2003, by Lincoln Ranch, describing Foskett Ranch as the servient tenement, and expressly giving SPI "the limited right to project noise, dust and odors from [the mill] onto the Servient Tenement in connection with the Mill Activities, but only as permitted by applicable laws and regulations."

Plaintiffs opposed the demurrer and asked the court not to take judicial notice of the grant of easement because defendant failed to establish it was properly recorded; it was not mentioned in the preliminary title report; and plaintiffs alleged the easement was not properly recorded, such that plaintiffs had neither actual nor constructive notice of it. Plaintiffs also argued the defense of constructive notice was unavailable to defendant due to defendant's misrepresentation of the extent of the annoyance (which assertedly dissuaded them from making further inquiry).[4]

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[4] The complaint alleged O'Neal *intended* to induce plaintiffs to forebear further inquiry and that plaintiffs relied on his representations.

On September 4, 2008, defendant filed a reply in the trial court, pointing out that plaintiffs failed to identify or allege any aspect in which the easement was not properly recorded. Defendant also asserted constructive notice was given by the recorded final subdivision map and the recorded CC&Rs, both of which defendant submitted to the trial court with a request for judicial notice. Although the request for judicial notice said defendant was submitting the final map for Village 1A of Foskett Ranch (where plaintiffs' home is located), defendant mistakenly submitted the (identical) final map for Village 1B.

We have taken judicial notice of the subdivision map for Village 1A (see fn. 2, *ante*). It contains a disclosure, under the heading "NOTES," as follows: "7. DISCLOSURE TO FUTURE OWNERS/RESIDENTS: . . . [¶] (D) EXISTING PROPERTY TO THE EAST OF THIS SUBDIVISION IS USED AS A LUMBER MILL, INCLUDING STORAGE OF LOGS AND CUTTING/MILLING OF WOOD PRODUCTS, WHICH IS A LEGAL CONFORMING USE. THERE IS THE POTENTIAL INCONVENIENCE RELATED TO NOISE, SMOKE, SOOT, ODORS AND LIGHT. A GRANT OF EASEMENT FOR OPERATION OF A LUMBER MILL (MILL ACTIVITIES) TO SIERRA PACIFIC INDUSTRIES, IS RECORDED IN DOCUMENT NO. 2003-0205966, O.R.P.C."

The CC&Rs, recorded in October 2004 (after the 2003 grant of the easement), contained a section (Article III) on "Easements and Encroachments," which described easements for utilities, drainage, and construction/sales activities but did

not mention the mill's easement.[5] However, the CC&Rs stated under Article XII (Miscellaneous):

"Section 12.09. Notice of Lumber Mill in the Vicinity of the Subdivision. The eastern boundary of Foskett Ranch is adjacent to the Sierra Pacific Inc. lumber mill. Accordingly, the Subdivision may be subject to some of the annoyances or inconveniences associated with proximity to lumber mill operations such as noise, heavy vehicular traffic, vibration, or odors. Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what lumber mill annoyances, if any, are associated with the Foskett Ranch development before you complete your purchase of a home in the Subdivision and determine whether they are acceptable to you."[6]

On September 11, 2008, the trial court issued a tentative ruling to take judicial notice of the subdivision map and CC&Rs (as well as the grant of easement) and to sustain defendant's demurrer without leave to amend (as well as a demurrer by First

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[5] The purchase agreement's disclosure statement expressly disclosed the CC&Rs, stating under the heading of general disclosure, "2. DECLARATION OF [CC&Rs]: By initialing this page [which was done], Buyer acknowledges that he/she has been informed that there will be, or has been, a recorded document of a Declaration of Covenants, Conditions, Restrictions and Reservation of Easements [CC&Rs] imposed upon the property being purchased. Included, *but not limited to*: modifications to your home, landscaping and fence, restrictions on vehicle parking, boat and RV storage, and home business activities. Further, Buyer has been given a copy of the document and has read and understood its content." (Italics added.)

[6] The CC&Rs' table of contents mislabeled this provision as notice of "Airport."

American Title Insurance Company). Plaintiffs requested a hearing as to defendant, but not as to First American.

On the date of the hearing, September 16, 2008, plaintiffs filed a written objection to the request for judicial notice filed with the reply on the ground that defendant could not raise new points in a reply brief. Plaintiffs also pointed out that defendant submitted the wrong subdivision map, for Village 1B, whereas plaintiff's home was in Village 1A.

On the same day, September 16, 2008, defendant submitted its attorney's declaration to support its request for judicial notice.

After the hearing, but before the trial court issued its ruling, defendant submitted on September 18, 2008, an "ERRATA/AMENDED REQUEST FOR JUDICIAL NOTICE," to correct its mistake and submit the Village 1A subdivision map.

On September 24, 2008, plaintiffs filed a written objection to the errata.

On September 29, 2008, the trial court issued its written ruling sustaining defendant's demurrer without leave to amend. The court stated it disregarded the papers filed after the hearing. The court explained it was also disregarding the objections submitted by plaintiffs at the time of the hearing due to plaintiff's inexcusable delay in waiting until the day of the hearing to make their objections. The court took judicial notice of the recorded easement and the CC&Rs. Plaintiffs had constructive notice of the easement and had actual notice of the emanations from the sawmill before they bought the property.

Additionally, plaintiff's own complaint quoted the disclosure statement in the purchase contract, referring to noise and odors from the neighboring sawmill. The court said that, to the extent the title report did not refer to the recorded easement, (1) plaintiffs admitted they did not receive the report until after they bought the property and therefore could not have relied on it, and (2) defendant cannot be held responsible for omissions in the title report.

The trial court entered a judgment of dismissal, and plaintiffs appeal.

DISCUSSION

I. Standard of Review

"'In evaluating a demurrer, we assume the truth of all material facts properly pleaded in the complaint unless they are contradicted by facts judicially noticed (Code Civ. Proc., §§ 430.30, subd. (a), 430.70; [citation]) but no such credit is given to pleaded contentions or legal conclusions. [Citations.]'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1371 (*Alfaro*).) We apply de novo review and must affirm a judgment of dismissal if any ground of demurrer is well taken and the complaint fails to state a cause of action under any possible legal theory. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The sustaining of a demurrer without leave to amend will not be upheld if the plaintiff shows there is a reasonable possibility of amending the complaint to cure the defect. (*Ibid.*)

II. Plaintiffs have no Viable Claims against Defendant

Plaintiffs argue defendant breached legal duties and committed fraud inducing them to buy the home by concealing the mill easement and misrepresenting mill operations. Plaintiffs admit they knew about the mill and its operations, but they argue that, had the easement been disclosed, they could have examined noise issues in light of the fact that they would have no legal recourse should they subsequently find the mill operations to be a nuisance. We shall conclude plaintiffs have no viable claims.

Plaintiffs claim defendant violated statutory duties of disclosure imposed by Civil Code sections 1102[7] et seq. and 2079,[8] as well as a common law duty of disclosure.

In their appellate brief, plaintiffs claim the disclosure statement provided by defendant violated section 1102.6, which mandates a particular form of disclosure for transactions governed by section 1102, including that the seller disclose any easements and neighborhood noise problems. Plaintiffs argue

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[7] Undesignated statutory references are to the Civil Code.

In a transfer governed by section 1102 et seq., the seller of real property shall deliver to the prospective buyer a written disclosure statement in a form provided by statute, disclosing conditions of the property, including easements and neighborhood noise problems. (§§ 1102.1, 1102.2, 1102.3, 1102.6.)

[8] Section 2079 imposes on real estate brokers or salesperson in certain situations the duty to inspect the property and disclose to prospective purchasers "all facts materially affecting the value or desirability of the property that an investigation would reveal . . . ."

that, regardless of whether or not the easement and noise were material facts, section 1102.6 required disclosure. However, plaintiffs never raised this point in the trial court. Their complaint merely alleged, under a heading of constructive fraud, that the facts were material and "section 1102 et seq. imposes a duty on real estate sellers, brokers and agents to make certain disclosures in good faith to the buyer after having conducted a competent investigation of the property subject to sale."

Moreover, the record on appeal shows this transaction was governed not by section 1102 et seq. or section 2079, but by the Subdivided Lands Act or SLA (Bus. & Prof. Code, § 11000 et seq.), which exempts this transaction from both sections 1102.6 and 2079. Thus, the SLA details the subdivider's duties in the sale of subdivided lands (*Manning v. Fox* (1984) 151 Cal.App.3d 531, 541-542), including the duty to submit information about the property to the Department of Real Estate (DRE) for issuance of a public report to be provided to prospective purchasers. (Bus. & Prof. Code, §§ 11010, 11018, 11018.1.) Subdivision sales requiring transmission of the public report to prospective purchasers under Business and Professions Code section 11018.1 are expressly exempt from section 1102 et seq. and 2079. (§§ 1102.2, subd. (a),[9] 2079.6.[10])

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[9] Section 1102.2 states, "This article does not apply to the following: [¶] (a) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code . . . ."

We recognize, as alleged in the complaint, that defendant was not the original developer but acquired a "significant portion" of Foskett Ranch from the original developer, Lincoln Ranch. Although the SLA does not define "subdivider," a DRE regulation defines it to include any person who owns five or more subdivision interests in a subdivision other than a timeshare project, for purposes of sale, lease or financing if the subdivision interests were acquired or are to be acquired from the original recipient of a public report for the subdivided land, or from a person who succeeded to the interest of the original recipient in five or more subdivision interests in a subdivision other than a time share project. (Cal. Code Regs., tit. 10, § 2801.5.) Here, the complaint alleged the original developer, Lincoln Ranch, sold "a significant portion of Foskett Ranch" to defendant. Plaintiff's opposition to the demurrer referred to defendant as the developer. The CC&Rs for Village 1A (where plaintiff's property is located) show defendant as a party to the CC&Rs. The subdivision maps show that Village 1A has far more than five lots. It thus seems apparent that this case is subject to the SLA and thus exempt

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10 Section 2079.6 states, "This article does not apply to transfers which are required to be preceded by the furnishing to a prospective transferee, of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code, unless the property has been previously occupied."

from section 1102 et seq.[11] Plaintiffs do not allege violation of the SLA.

Thus, plaintiffs present no viable statutory claim, and we turn to the common law claim.

Calemine v. Samuelson (2009) 171 Cal.App.4th 153, (*Calemine*), explained the common law duty: "'In the context of a real estate transaction, "[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer."'" (*Id.* at p. 161.) Undisclosed facts are material if they would have a significant and measurable effect on market value. (*Ibid.*) "A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. [Citation.] Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a

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[11] It would have been nice had defendant addressed this in the trial court in response to the complaint's allegation of violation of sections 1102 and 2079, or in its respondent's brief, instead of waiting until oral argument in this court.

We observe one of plaintiffs' cited authorities, *Alfaro, supra*, 171 Cal.App.4th 1356, mentions section 1102 in a case about a development project with at least 23 residences, but also said the plaintiffs had not alleged a statutory violation. (*Id.* at pp. 1383 & fn. 20.)

representation of the nonexistence of the facts which he has failed to disclose [citation].' [Citation.]" (*Ibid.*, italics omitted.)

Plaintiffs claim their allegations present questions of fact inappropriate for demurrer. Plaintiffs cite *Calemine*'s statement that "[g]enerally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine, supra,* 171 Cal.App.4th 153, 161.) However, in *Calemine* there was an undisputed failure by the seller to disclose prior lawsuits against the developer and a flooring company regarding water intrusion into the home. The seller disclosed the water problems but not the prior lawsuits, asserting he believed he was required to disclose pending lawsuits only. (*Id.* at pp. 164-165.) The appellate court reversed a summary judgment due to triable issues regarding common law materiality of the prior lawsuits, which were not within the buyer's diligent attention. (*Id.* at pp. 164-166.)

Here, defendant gave plaintiffs a disclosure statement disclosing the mill and warning it might be an annoyance and also disclosing that recorded easements (for utilities, etc. "and other purposes") were shown on the recorded subdivision map. Additionally, the fact of the recorded easement was clearly within the reach of the diligent attention and observation of plaintiffs. Thus, plaintiffs had actual notice of the mill operations and constructive notice of the mill easement. Actual notice is "express information of a fact,"

while constructive notice is notice imputed by law. (Civ. Code, § 18.) "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (§ 19.)

Plaintiffs argue that, although constructive notice may be considered in analyzing a disclosure duty, the question whether the recording of an encumbrance satisfies that duty is generally a question of fact. They cite *Alfaro, supra*, 171 Cal.App.4th 1356, for the proposition that a seller must show the buyer had actual notice of a recorded encumbrance in order to support a demurrer. However, we see no such statement in the lengthy *Alfaro* opinion (*id.* pp. 1363-1398), which we discuss *post*, and plaintiffs provide no jump cite to the location of any such statement. Elsewhere in their brief, plaintiffs assert that *Alfaro* at page 1395 said the plaintiffs must have actual notice. However, that portion of *Alfaro* was discussing the question of when fraud was discovered so as to start the statute of limitations.

"[T]he recording of a deed restriction is ordinarily regarded as imparting constructive notice of its contents to subsequent purchasers. ([] § 1213 . . . .) . . . 'Constructive notice is "the equivalent of actual knowledge; i.e., knowledge of its contents is conclusively presumed."'" (*Alfaro, supra*, 171 Cal.App.4th at p. 1385, italics omitted.) "Actual notice is 'express information of a fact . . . .' ([] § 18, subd. 1.)

'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' ([] § 19 . . . .)" (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.)

Plaintiffs argue the subdivision map contained a directive creating a duty in defendant to disclose the easement. However, we see nothing in the subdivision map requiring defendant to do anything. Rather, the subdivision map itself made the disclosure, under the heading "NOTES," as follows: "7. DISCLOSURE TO FUTURE OWNERS/RESIDENTS: . . . [¶] (D) EXISTING PROPERTY TO THE EAST OF THIS SUBDIVISION IS USED AS A LUMBER MILL, INCLUDING STORAGE OF LOGS AND CUTTING/MILLING OF WOOD PRODUCTS, WHICH IS A LEGAL CONFORMING USE. THERE IS THE POTENTIAL INCONVENIENCE RELATED TO NOISE, SMOKE, SOOT, ODORS AND LIGHT. A GRANT OF EASEMENT FOR OPERATION OF A LUMBER MILL (MILL ACTIVITIES) TO SIERRA PACIFIC INDUSTRIES, IS RECORDED IN DOCUMENT NO. 2003-0205966, O.R.P.C."

The disclosure in defendant's disclosure statement that recorded easements "for other purposes" were shown on the recorded subdivision map (which expressly mentioned the sawmill easement) satisfied defendant's duty of disclosure. Thus, this court held in *Stevenson v. Baum* (1998) 65 Cal.App.4th 159 (*Stevenson*), that a seller of a mobile home park, by warning the buyers in the purchase contract that they took title free of easements "other than those of record," satisfied his duty of disclosure and put them on notice of facts ascertainable from

the public records. (*Id.* at p. 166.) The buyers were aware (from a title policy) that an oil company had a recorded easement for ingress and egress, but the title policy failed to mention that the easement was also for pipelines purposes -- a fact clearly stated in the public records. (*Id.* at p. 161.) We affirmed summary judgment in favor of the seller, rejecting the buyers' argument that the seller had a common law duty to disclose the pipeline's existence and actual location. (*Id.* at p. 165.) The seller could be liable only if he failed to disclose any material information known to him which he knew was not known to the buyers and not within the reach of their diligent attention. (*Ibid.*) The pipeline's existence and location were easily ascertainable from the public records. (*Id.* at p. 166.)

The buyers in *Stevenson, supra*, 65 Cal.App.4th 159, 166, argued constructive notice of matters of record is not a defense to fraud, citing *Seeger v. Odell* (1941) 18 Cal.2d 409. *Stevenson* said *Seeger* was distinguishable. In *Seeger* the defendants falsely told the elderly, unsophisticated plaintiffs that the plaintiffs' land had been sold to some of the defendants at an execution sale, so as to induce the plaintiffs to execute a lease with another defendant. In truth, no sale had occurred. Had the plaintiffs known this fact, which was ascertainable from public records *not* easily accessible to them, they would not have entered into the lease. *Stevenson* said, "*Seeger* is a case of active, affirmative, intentional misrepresentation, not the mere alleged failure to disclose;

moreover, *Seeger* did not involve facts which were just as accessible to the plaintiff as to the defendant." (*Stevenson, supra*, 65 Cal.App.4th at pp. 166-167.)

Although plaintiffs argue they, unlike the *Stevenson* plaintiffs, did allege violation of statutory duties, we have explained the cited statutes did not apply.

Here, defendant provided plaintiffs with a disclosure statement disclosing the adjacent mill operations, and plaintiffs were admittedly aware of the existence of the mill and its operations. That the disclosure statement expressly listed some easements (for utilities, drainage, construction and sales activities) did not imply the mill had no easement, nor did it create an independent duty to list all easements, as plaintiffs suggest. The disclosure statement specified the existence of easements "for other purposes," other than those listed. The listed easements were ones normally to be expected in a subdivision and thus could be expected to be part of contract boilerplate.

Although plaintiffs argue this court should not take judicial notice that the mill easement was *properly* recorded, they present no facts or argument that the easement was improperly recorded, nor do they present any authority that defendant's demurrer could not succeed unless proper recording was affirmatively established.

Plaintiffs argue that, unlike *Stevenson, supra*, 65 Cal.App.4th 159, they did not have actual notice of the easement. They only had notice of the mill operations, not the

easement. Plaintiffs think *Stevenson*'s holding is merely that a buyer who has actual notice of an easement also has constructive notice of its contents. We disagree. The holding of *Stevenson* is that, absent fraud, the seller has no duty to disclose publicly recorded facts easily ascertainable to the buyer.

Plaintiffs argue fraud -- both concealment and affirmative misrepresentations -- precludes defendant from relying on the public recordings. We disagree.

Alfaro, supra, 171 Cal.App.4th 1356, 1385, said the fact that a person had constructive notice of the truth from public records is no defense to fraud. The existence of such public records may be relevant to whether a victim's reliance was justifiable, but it is not, by itself, conclusive. (*Id.* at pp. 1385-1386.) Nevertheless, "though defrauded buyers will not be deemed to have constructive notice of public records, this does not insulate them from evidence of their actual knowledge of the contents of documents presented to them *or from being charged with inquiry notice based on those documents*." (*Id.* at p. 1389.)

Fraud may be based on concealment such as nondisclosure when a person has a duty to disclose. (*Reed v. King* (1983) 145 Cal.App.3d 261, 265 [seller may have duty to disclose that home was site of multiple murder].)

Plaintiffs cite *Alfaro, supra*, 171 Cal.App.4th 1356, which involved a restrictive covenant. Buyers in *Alfaro*, who bought homes from community organizations through a low-income housing program that required buyers to invest time and labor, claimed

they did not learn of a deed restriction requiring that the homes remain affordable to low and moderate income people, until after the buyers had invested their time and labor. (*Id.* at p. 1364.) The buyers did not seek to rescind but sought to invalidate the restriction or obtain damages. (*Id.* at pp. 1364, 1383.) Some but not all of the grant deeds expressly referred to the recorded deed restriction. (*Id.* at pp. 1366-1368, 1375.) The appellate court (1) affirmed the dismissal following demurrer as to the buyers whose grant deeds referenced the restriction but (2) reversed the dismissal following demurrer as to the buyers whose grant deeds did not expressly reference the restriction. The latter group could not invalidate the deed restriction but may be entitled to damages if they could prove they were induced to perform labor by the failure to disclose. (*Id.* at pp. 1393, 1395.) Their "constructive notice of the deed restriction by virtue of its recording does not preclude them from seeking damages based on the allegation that they were induced to labor for months by defendants' failure to disclose its existence." (*Id.* at p. 1393.)

Alfaro, supra, 171 Cal.App.4th 1356, said a claim of fraud may arise when the defendant makes a representation likely to mislead absent a disclosure, when there is active concealment, or when one party has sole knowledge or access to material facts and knows these facts are not known to or reasonably discoverable by the other party. (*Id.* at p. 1382.) A seller of real property has a common law duty to disclose where the seller knows of facts materially affecting the value or desirability of

the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of, the buyer. (*Ibid.*) The seller is required to disclose the fact affecting the property's value, not to explain why that fact affects the value. (*Id.* at p. 1383.)

Here, defendant's nondisclosure of the easement will not support actionable fraud, because plaintiffs are charged with inquiry notice based on the documents presented to them. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.)

Plaintiffs cite *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, which held the existence of publicly available information did not necessarily preclude a fraud claim. There, a corporation's lawyer allegedly concealed from a shareholder (in a company being acquired) "toxic" terms relevant to a merger transaction. Before the transaction was completed, the toxic terms were disclosed in a certificate the corporation filed with the Delaware Secretary of State. The appellate court said the sustaining of a demurrer was improper because factual questions existed as to whether a consent form signed by the plaintiff, which mentioned a certificate would be filed, made the toxic terms reasonably accessible to the plaintiff. (*Id.* at p. 295.) *Vega* does not help plaintiffs, because here the existence of the easement and the extent of the noise were reasonably accessible to plaintiffs.

Plaintiffs argue that (unlike *Stevenson, supra*, 65 Cal.App.4th 159,) this case involved not mere nondisclosure but

also affirmative misrepresentations about the noise levels. The complaint alleged the agent said, "what [plaintiffs] could see and hear [during their visit] is how it was 24/7." While a reasonable person would interpret this to mean it was always loud, plaintiffs claim the agent's comment was a promise that the noise would never be louder than it was at that moment. Assuming plaintiffs' construction is reasonable, it does not save their complaint. The facts about the noise level were easily within the reach of the diligent attention and observation of plaintiffs. Thus, they have no viable claim based on the agent's statement about the noise level.

Plaintiffs argue they cannot be charged with notice of a recorded easement they would not have discovered upon inquiry. They point out the preliminary title report they received after they bought the property failed to mention the recorded easement.

However, preliminary title reports have limited significance. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389, citing Ins. Code, §§ 12340.10 et seq.) They are offers to issue a title policy subject to stated exceptions; they are not abstracts of title, i.e., a written listing of all recorded conveyances affecting the chain of title. (Ins. Code, §§ 12340.10-12340.11.) The reports serve to apprise the prospective insured of the state of title against which the insurer is willing to issue a title insurance policy. (*Alfaro, supra*, 171 Cal.App.4th at p. 1389.) Thus, the flaw in the

preliminary title report (which is not alleged to be defendant's fault) affords no basis for imposing liability on defendant.

We conclude the trial court properly sustained defendant's demurrer.

Plaintiffs argue this court should grant them leave to amend, even for amendments not proffered in the trial court. However, the burden is on plaintiffs to show a reasonable possibility of curing the complaint's defects (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081), and they have failed to do so.

The complaint alleged the real estate agent said he had not received any complaints about the mill, but the complaint did not allege the existence of any such prior complaints. Plaintiffs argue they can amend to add allegations that defendant did receive a prior complaint. However, apart from failing to show how this would save their lawsuit (given the information that *was* available to plaintiffs), the proposed amendment would merely allege a prospective buyer withdrew because of the mill noise, contrary to the agent's assertion that the buyer withdrew due to financing problems. We observe plaintiffs do not seek to allege that defendant received a prior complaint from a homeowner whose separate appeal against defendant is pending in this court (see fn. 2, *ante*). Plaintiffs' reply brief says that lawsuit is not relevant to this case.

In asking for leave to amend, plaintiffs argue they viewed the property on a Saturday afternoon at 1:00 p.m., and defendant

knew or should have known that the mill was quieter at that time as compared to the rest of the week. Plaintiffs quote from *Alexander v. McKnight* (1992) 7 Cal.App.4th 973, that the presence in a neighborhood of an "overtly hostile family who delights in tormenting their neighbors with unexpected noises or unending parties is not a matter which will ordinarily come to the attention of a buyer viewing the property at a time carefully selected by the seller to correspond with an anticipated lull" in the activity. (*Id.* at p. 977.)

However, *Alexander* applied the principle that where the seller knows of facts materially affecting the property's desirability "which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer . . . ." (*Alexander, supra,* 7 Cal.App.4th 973, 977.) That principle is inapplicable here, where the existence of the mill was obvious, and plaintiffs saw the mill and could have learned the exact extent of the noise by visiting at other times of the week. Indeed, the complaint alleges plaintiffs visited three times. Any person with any common sense would realize the possibility that weekdays might be noisier than weekends and that individual tolerance to noise will vary from person to person. *Alexander* does not apply.

Plaintiffs argue they could amend the complaint to allege that defendant failed to disclose that the subdivision was in violation of development conditions regarding sound mitigation,

in that defendant failed to build a sound wall, as required by the City, to reduce the mill noise. Plaintiffs cite *Barder v. McClung* (1949) 93 Cal.App.2d 692, 697, as upholding a judgment finding a seller liable for fraud for failing to disclose that part of the house violated zoning ordinances. The defendants/sellers had obtained building permits for living space in the garage building and the original work complied with the permits. (*Id.* at p. 693.) Two years later, the defendants had extended the garage and added a kitchen without obtaining a permit. (*Ibid.*) In *Barder*, there was no indication that the undisclosed information was readily available to the buyer from recorded documents. (*Id.* at p. 697.) The buyer's personal inspection of the property was not a defense, because the fact that the house violated the ordinance was not visible and was known only to the seller, and the seller knew the fact of the violation was not within the reach of the diligent observation and attention of the buyer. (*Ibid.*)

However, plaintiffs' addition of allegations that defendant failed to complete a sound wall would not save plaintiffs' lawsuit, because their complaint alleged the City called for the sound wall in 1999. Therefore, it was superseded by the City's 2003 directive for Lincoln Ranch to grant an easement allowing the mill to project noise, dust and odor onto Foskett Ranch, within levels allowed by applicable laws and regulations.

Plaintiffs' reply brief offers a more extensive list of additional facts they would like to add by amendment. Even though a request for leave to amend may be made for the first

time on appeal, we may disregard new points raised for the first time in a reply brief. (*Alfaro, supra*, 171 Cal.App.4th at p. 1394, fn. 23.)

We conclude the trial court properly sustained the demurrer without leave to amend, and plaintiffs fail to show a possibility of saving the complaint by amendment.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

SIMS, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.